APPEAL NO. 030569
FILED APRIL 24, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 5, 2003. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) on-the-job injury of _____, is not compensable, for the reason that it occurred as a result of the claimant's willful attempt to unlawfully injure another person. The hearing officer also determined that the claimant did not have disability. The claimant appeals the hearing officer's decision, arguing that the great weight of the evidence does not support the hearing officer. The respondent (carrier) responds, urging that the hearing officer be affirmed.

DECISION

Reversed and rendered.

All save one of the salient facts in this case are not in dispute. On _____, the claimant and his friend and coworker, Mr. J, were performing their jobs as roofing laborers along with their supervisor, Mr. C. It is not unimportant to note that Mr. C is the son of the owner of the employer and six years senior to the 20-year-old claimant. The claimant and Mr. C disagreed as to whether the paint they were using required stirring. An argument between the claimant and Mr. C ensued, Mr. C told the claimant to leave, Mr. C forcefully grabbed the paintbrush out of the claimant's hand, spraying him with paint, the claimant began to gather his things[1], then Mr. C struck the claimant in his jaw, first with his left fist, then with his right. Neither the claimant nor his friend Mr. J struck Mr. C, either before or after Mr. C struck the claimant. Mr. J then took the claimant to the emergency room, where he was diagnosed with multiple fractures of his mandible (jaw). The only issue disputed by the parties at the CCH is whether the claimant threatened Mr. C with the can of paint prior to Mr. C's striking the claimant, thus allowing Mr. C the factual argument of self-defense and the legal argument of the claimant's "willful intent to unlawfully injure another person."

The hearing officer found that the claimant was unable to obtain and retain employment at his preinjury wage from September 10 through November 26, 2002, due to his broken jaw; however, she did not conclude that the claimant had disability, as she determined that the injury was the result of the claimant's willful intent to injure another person.

Concerning the intentional injury issue, Section 406.032(B) provides, in part, that an insurance carrier is not liable for compensation if the injury was caused by the employee's willful attempt to unlawfully injure another person. As with the other

[1] In dispute is what personal items the claimant had with him on the roof, and whether the claimant had the paint can in his hand in order to replace the lid on the can before leaving, or to "threaten" Mr. C. It is not disputed that the paint can lid was between the claimant and Mr. C.

exceptions to liability in Section 406.032, the carrier had the burden to raise an issue of intentional injury with probative evidence and, if raised, the claimant had the burden to prove that the injury was not intentional. The hearing officer based her decision on scant evidence, at best. Given the only issue in dispute, the only probative evidence was that regarding the few minutes before, during, and after Mr. C's striking the claimant. Mr. J testified, as did the claimant, that Mr. C struck the claimant without warning and while the claimant was gathering his things to leave the work site, as ordered. Both Mr. J and the claimant testified that Mr. C had a reputation of threatening people on the job, including Mr. J but not the claimant, and that he quickly angered and struck the claimant in keeping with his reputation. Mr. C testified that he thought that the claimant may strike him with the paint can, but such a scenario flies in the face of logic and reason, i.e., had the claimant been preparing to strike Mr. C, it is unlikely that Mr. C would have successfully landed two blows, one with each of his fists, without sustaining some injury or other repercussion from the claimant or his friend, Mr. J.

The carrier presented the testimony of Mr. C's father, the owner of the roofing business, and another worker, Mr. K, neither of whom witnessed the event. Mr. C's father testified that Mr. J told him at the emergency room that Mr. C was protecting himself from the claimant threatening him with the paint can, but Mr. J directly disputed this testimony. Mr. K testified that the claimant previously threatened Mr. C and that Mr. C knew about it. However, according to Mr. K on cross-examination, the claimant's threats against Mr. C, if made, were made *after* _____; thus, such threats, if any, would have had no impact on Mr. C's state of mind on the date of injury. Mr. K's testimony, such as it was, is the only evidence presented that Mr. C may have felt threatened by the claimant, other than that made by Mr. C, which testimony was unclear and equivocal regarding the location of the men on the roof at the time of the incident, the sequence of events, and his state of mind in terms of his claim of self-defense.

It is also worth noting that Mr. C testified that the authorities brought misdemeanor criminal charges against him for striking the claimant, the only criminal charges stemming from this incident. The record indicates that the disposition of those charges was not resolved at the time of the CCH. It appears that the hearing officer improperly considered some extremely tangential, irrelevant, and prejudicial evidence regarding unrelated criminal charges brought against the claimant and Mr. J, which the record demonstrated were either thrown out by a grand jury (the claimant), or in the process of disposition and hotly contested (Mr. J).

In his appeal, the claimant directs our attention to the fact that at the CCH, the carrier chose to have Mr. C sit in the hearing room as the employer representative, instead of the owner of the employer, Mr. C's father, who was later called as a witness. The claimant points out that Mr. C's being allowed in the hearing room for the whole of the testimony gave Mr. C a distinct advantage prior to his testimony. While we do not ascribe ill motive to the carrier, this situation becomes of greater interest when Claimant's Exhibit No. 2 is examined. In Claimant's Exhibit No. 2, an incident report completed by Mr. C, two portions were left blank: 1) "ITEM THAT CAUSED ACCIDENT:" and 2) "PLEASE STATE HOW INJURY OCCURRED (WHAT EMPLOYEE

WAS DOING, AND WHAT PART OF THE BODY WAS AFFECTED)." We note that Mr. C testified regarding these issues at the CCH after having listened to the claimant's and Mr. J's testimony of the events of the date of injury.

In Texas Workers' Compensation Commission Appeal No. 93436, decided July 16, 1993, Judge Nesenholtz wrote:

> As this panel stated in an earlier decision, Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, "[w]e do accord appropriate deference to a hearing officer in his or her fact finding role and are instructed to do so as clearly set forth in Article 8308-6.34(e) which provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. However, where our careful and thorough evaluation of all the evidence in the record compellingly leads us to conclude that the evidence in opposition to a finding is so great in weight and preponderance against the finding, we must set aside such finding on a legal sufficiency basis."

The hearing officer's decision here is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust[2]; therefore, we must reverse and render a decision that the claimant's on-the-job injury is compensable, because it did not occur as a result of the claimant's willful intent to injure another person, but because the claimant's supervisor struck the claimant, breaking his jaw. As a result of his broken jaw and the treatment therefore, the claimant had disability from September 10 through November 26, 2002.

The true corporate name of the insurance carrier is **DALLAS FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSS POLK
14160 DALLAS PARKWAY, SUITE 700
DALLAS, TEXAS 75254.

Terri Kay Oliver
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

[2] Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

DISSENTING OPINION:

I respectfully dissent. I believe that the majority has failed to follow the standard of review, by impermissibly substituting its judgment on the credibility of the testimony and evidence for that of the hearing officer. I cannot agree that the hearing officer's decision is against the great weight of the evidence and, as such, I would affirm.

_____
Elaine M. Chaney
Appeals Judge